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In the Supreme Court of the United States

OCTOBER TERM, 1978

ROBERT EDWIN BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 29a-41a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1978. A petition for rehearing was denied on July 24, 1978. The petition for a writ of certiorari was filed on August 23, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court's ruling that land sales contracts sold to investors were "securities" constituted a retroactive application of the law.

2. Whether it was necessary for the government to prove that petitioner was aware that land sales contracts were securities to establish that he engaged in a willful securities fraud in violation of 15 U.S.C. 77q(a) and 77x.

STATEMENT

Following a bench trial in the United States District Court for the District of Arizona, petitioner was convicted on 10 counts of securities fraud, in violation of 15 U.S.C. 77q(a) and 77x, and one count of conspiracy to engage in securities fraud, in violation of 18 U.S.C. 371.[1] He was sentenced to five concurrent terms of five years' imprisonment and fined $35,000.

The evidence demonstrated that petitioner was the president of Buckeye Mines, Inc., a holding company, and its subsidiaries, Arizona-Florida Development Corp. (AFDC) and Corona de Tuscon (Corona) (R. 753-754). These firms were engaged in the development of real estate located in Arizona and Florida (R. 485; Pet. App. 30a-31a).

Purchasers of real estate would make initial down payments and agree to pay the balance on a monthly basis over a 36 or 60-month period (R. 234, 237, 317). To obtain cash on a rapid basis, AFDC assigned its rights under these contracts. Summit Investment Co., a factor, purchased the contracts for 80% of face value and, in turn, marketed them to individual investors (R. 311, 313, 498). AFDC remained obligated to the investors as a guarantor of the monthly payments of the real estate purchasers (Pet. App. 31a).

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[1]Petitioner was convicted on counts 2, 4, 6, 7, 9, 10, 12, 14, 19, and 20 of the indictment. See Pet. App. 1a-25a, 26a.

Instead of contracts entered into by actual purchasers, however, petitioner assigned forged contracts bearing fictitious names (R. 780), names of buyers who had cancelled and were not obligated to make payment (R. 234), and names of AFDC salesmen who were under no obligation to make payment (R. 181). In an attempt to conceal the fictitious nature of these contracts, petitioner paid certain sums of money to the investors who had bought the contracts (R. 771-773). In August 1973, however, the payments ceased and petitioner's companies defaulted on their obligations. At that time, they were indebted to public investors in an amount exceeding six million dollars (Pet. App. 31a).

1. Petitioner contends (Pet. 6-9) that due process was denied when the trial court determined that the land sale contracts were "securities." Petitioner asserts that this was a retroactive application of the law, and that he had "no fair warning" prior to that time that the obligations that he sold to investors could be deemed "securities."

Because this issue was not raised in or decided by the courts below, it is not properly presented here. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, petitioner's claim of retroactivity is groundless. Petitioner now concedes that "the contracts are subject to the Act" (Pet. 7, n. *). Public investors purchased investment contracts that were sold by petitioner's companies and underwritten by Summit. They were induced to give money to a common business enterprise with the expectation of profit deriving solely from the managerial efforts of others. Such investment contracts fall squarely within the statutory definition of a security. That principle was established long ago, and no retroactive application of the law is involved. See *SEC* v.

W.J. Howey Co., 328 U.S. 293, 298-299 (1946) ("land sales contract"); *SEC* v. *C.M. Joiner Leasing Corp.*, 320 U.S. 344, 351-353 (1943) ("interest in real estate").[2] See also *Los Angeles Trust Deed & Mortgage Exchange* v. *SEC*, 285 F. 2d 162, 166-167 (9th Cir. 1960), cert. denied, 366 U.S. 919 (1961); *SEC* v. *Lake Havasu Estates*, 340 F. Supp. 1318, 1321-1323 (D. Minn. 1972).[3]

Marks v. *United States*, 430 U.S. 188, 191-196 (1977), has no relevance here. *Marks* held that it was improper to apply a new definition of obscenity retroactively where the defendant's conduct would not have been punishable under the definition applicable at the time of the alleged offense. In such a case, the defendant had "no fair warning" of potential criminal liability. Here, in contrast, the courts below applied a previously existing legal standard to petitioner's conduct, and no question of unfairness arises.

2. Petitioner also argues (Pet. 9-12) that he cannot be convicted in the absence of proof that he knew or should have known that the investment contracts that he sold were "securities" giving rise to jurisdiction under the federal securities laws, 15 U.S.C. 77x.

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[2]Of course, where interests in real estate are sold to persons intending to occupy the real estate themselves, a security sale is not involved. *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, (1975); 1 L. *Loss, Securities Regulation* 493 (2d ed. 1961). But that principle is inapplicable here because the contracts in question were sold to investors.

[3]This case has no relationship to *International Brotherhood of Teamsters* v. *Daniel*, Nos. 77-753, 77-754 (cert. granted Feb. 21, 1978). *Daniel* is a civil action under Rule 10b-5, raising the issue whether employee interests in involuntary-noncontributory pension plans constitute securities.

But petitioner had every reason to know that his conduct could be punished under federal law, as the foregoing cases establish. Moreover, petitioner's fraud was obviously a violation of state law, and his ignorance of the basis for federal jurisdiction is simply no defense: "The concept of criminal intent does not extend so far as to require that the actor understand not only the nature of his act but also its consequence for the choice of a judicial forum." *United States* v. *Feola*, 420 U.S. 671, 685 (1975). This general rule has long prevailed under the Securities Act of 1933. See *Tager* v. *SEC*, 344 F. 2d 5, 8 (2d Cir. 1965): "It has been uniformly held that 'willfully' in this context means intentionally committing the act which constitutes the violation. There is no requirement that the actor also be aware that he is violating one of the Rules or Acts." See also *United States* v. *Brashier*, 548 F. 2d 1315, 1328 (9th Cir. 1976); *United States* v. *Benjamin*, 328 F. 2d 854, 862-863 (2d Cir. 1964).

United States v. *Critzer*, 498 F. 2d 1160, 1162 (4th Cir. 1974), and *United States* v. *Lizarraga-Lizarraga* 541 F. 2d 826, 828-829 (9th Cir. 1976), do not conflict with the decision below. Neither case dealt with the *mens rea* requirement of 15 U.S.C. 77x. *Critzer* interpreted the *mens rea* requirement of the Internal Revenue Code, concluding that the defendant did not act with a culpable state of mind where the Department of the Interior had advised her to act as she did and where "co-ordinate branches of the United States Government plausibly reach[ed] directly opposing conclusions." *Lizarraga* held that a prosecution under the National Security Act of 1954 required proof that the defendant had specific knowledge that particular merchandise could not be exported, because the merchandise was not contraband and "might be exported or imported innocently." In the present case,

in contrast, petitioner had no reasonable ground to conclude that his conduct was beyond the scope of federal law and could not have regarded his fraudulent scheme as "innocent."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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